No. 01-687

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

LEONARD COTTON, MARQUETTE HALL, LAMONT THOMAS, MATILDA HALL, JOVAN POWELL, JESUS HALL, AND STANLEY HALL, JR.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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62 pp

QUESTION PRESENTED

Whether the court of appeals erred in vacating respondents' sentences pursuant to *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), when they were sentenced for a crime different from the crime that was charged in the indictment and found by the petit jury?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. Background	3
B. The District Court Proceedings	5
C. The Court of Appeals Decision	7
SUMMARY OF ARGUMENT	10
ARGUMENT	12
I. A SENTENCING COURT'S JURISDICTION IS LIMITED TO THE OFFENSES CHARGED IN THE INDICTMENT	12
A. The Error In This Case Is Jurisdictional Because The Indictment Defines The Scope Of The District Court's Power	12

TABLE OF CONTENTS—continued

Page

B. Failure To Charge An Element Of The Crime In A Charging Document Is A Jurisdictional Defect That Cannot Be Waived 17

C. A Sentence Above The Statutory Maximum Of The Indictment Offense Exceeds The Court's Power 19

II. IMPOSING A SENTENCE THAT WAS NOT PERMITTED UNDER THE INDICTMENT IS SO INTRINSICALLY HARMFUL AS TO CONSTITUTE STRUCTURAL ERROR REQUIRING REVERSAL. 22

A. This Court Has Found That Indictment Errors Warrant Reversal, Regardless Of Their Forfeiture 22

B. The Violation Of The Right To Indictment By A Grand Jury Is A Structural Error 24

C. The Denial Of The Right To A Petit Jury Verdict Beyond A Reasonable Doubt On Each Element Of An Offense Is Structural Error Under *Sullivan* v. *Louisiana* 35

D. Structural Errors Warrant Correction Regardless Of The Evidence 36

TABLE OF CONTENTS—continued

Page

III. THE ERRORS IN THIS CASE WARRANT REVERSAL UNDER HARMLESS-ERROR OR PLAIN-ERROR REVIEW 38

A. Reversal Is Warranted Under Harmless-Error Review 38

1. Respondents' Right To Liberty And Their Right To A Grand Jury Were Violated By The Errors Here 38

2. Respondents Did Not Receive The Constitutionally Required Notice Of The Crime For Which They Were Sentenced, But Even If They Had, Such Notice Could Not Cure The Defects In The Proceeding Here 39

3. Respondents Are Not Subject To Plain-Error Review Because They Objected At The Earliest Possible Moment In The Proceeding 41

B. Application of Plain-Error Review Warrants Affirmance of the Court of Appeals Decision ... 43

1. Respondents' Substantial Right To Liberty Was Violated 43

2. The Errors Undermined The Integrity, Public Reputation, And Fairness Of The Criminal Proceeding 44

TABLE OF CONTENTS—continued

Page

3. The Fourth Prong Of Plain-Error Review Calls For The Evaluation Of An Error's Effect Independent Of A Defendant's Innocence Or Guilt Where The Right Violated Protects Values Distinct From The Accuracy Function Of The Trial 45

C. The Lower Court's Choice To Reverse In A Case Where Judicial Integrity Was Compromised Preserves The Discretionary Nature Of Plain-Error Review 48

CONCLUSION 50

TABLE OF AUTHORITIES

CASES Page

Albrecht v. *United States*, 273 U.S. 1 (1927)..... 12, 17
Apprendi v. *New Jersey*, 530 U.S. 466 (2000).....*passim*
Arizona v. *Fulminante*, 499 U.S. 279 (1991).....*passim*
Ex parte Bain, 121 U.S. 1 (1887), *overruled on other grounds*, *United States* v. *Miller*, 471 U.S. 130 (1985).....*passim*
Ball v. *United States*, 140 U.S. 118 (1891)..... 12
Ballard v. *United States*, 329 U.S. 187 (1946) 46
Bender v. *Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986)..... 20
Bigelow v. *Forrest*, 76 U.S. (9 Wall.) 339 (1869).. 20
In re Bonner, 151 U.S. 242 (1894)..... 19
Calder v. *Bull*, 3 U.S. (3 Dall.) 386 (1789)..... 15
Campbell v. *Louisiana*, 523 U.S. 392 (1998) 31
Carmell v. *Texas*, 529 U.S. 513 (2000) 15
Chapman v. *California*, 386 U.S. 18 (1967)..... 23
Cole v. *Arkansas*, 333 U.S. 196 (1948) 32
Cook v. *State*, 902 S.W.2d 471 (Tex. Crim. App. 1995)..... 32
Delaware v. *Van Arsdall*, 475 U.S. 673 (1986)..... 38
Dunn v. *United States*, 442 U.S. 100 (1979)..... 32
Gaither v. *United States*, 413 F.2d 1061 (D.C. Cir. 1969)..... 25, 26
Gideon v. *Wainwright*, 372 U.S. 335 (1963) 27
Griffith v. *Kentucky*, 479 U.S. 314 (1987)..... 7
Hamling v. *United States*, 418 U.S. 87 (1974)..... 12
Hardy v. *United States*, 691 F.2d 39 (1st Cir. 1982)..... 20
Jefferson v. *State*, 556 So. 2d 1016 (Miss. 1989)... 32
Johnson v. *United States*, 520 U.S. 461 (1997) ....*passim*
Jones v. *United States*, 526 U.S. 227 (1999) 4, 21
Lamar v. *United States*, 240 U.S. 60 (1916)..... 16
Lamar v. *United States*, 241 U.S. 103 (1916)..... 16

TABLE OF AUTHORITIES—continued

	Page
Ex parte Lange, 85 U.S. (18 Wall.) 163 (1873), *double jeopardy holding limited by United States* v. *DiFrancesco*, 449 U.S. 117 (1980)	19
Libretti v. *United States*, 516 U.S. 29 (1995)	14
Louisville & Nashville R.R. v. *Mottley*, 211 U.S. 149 (1908)	17
McKaskle v. *Wiggins*, 465 U.S. 168 (1984)	46
In re Mills, 135 U.S. 263 (1890)	19
Neder v. *United States*, 527 U.S. 1 (1999)	*passim*
Peters v. *Kiff*, 407 U.S. 493 (1972)	31
Post v. *United States*, 161 U.S. 583 (1896)	12
Rose v. *Clark*, 478 U.S. 570 (1986)	24, 34, 36
Russell v. *United States*, 369 U.S. 749 (1962)	*passim*
Sheppard v. *Maxwell*, 384 U.S. 333 (1966)	27
Silber v. *United States*, 370 U.S. 717 (1962)	9, 11, 22, 36, 47
Smith v. *United States*, 360 U.S. 1 (1959)	36
State v. *Childs*, 724 N.E.2d 781 (Ohio 2000)	32
Stirone v. *United States*, 361 U.S. 212 (1960)	*passim*
Sullivan v. *Louisiana*, 508 U.S. 275 (1993)	*passim*
Tumey v. *Ohio*, 273 U.S. 510 (1927)	27, 37
United States Nat'l Bank v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439 (1993)	48
United States v. *Atkinson*, 297 U.S. 157 (1936)	42
United States v. *Bjorkman*, 270 F.3d 482(7th Cir. 2001)	4
United States v. *Calandra*, 414 U.S. 338 (1974)	25, 33
United States v. *Corrick*, 298 U.S. 435 (1936)	21
United States v. *Dionisio*, 410 U.S. 1 (1973)	26
United States v. *Fletcher*, 74 F.3d 49 (4th Cir. 1996)	42
United States v. *Gaudin*, 515 U.S. 506 (1995)	18
United States v. *Hess*, 124 U.S. 483 (1888)	40
United States v. *Hooker*, 841 F.2d 1225 (4th Cir. 1988)	21

TABLE OF AUTHORITIES—continued

	Page
United States v. *Mechanik*, 475 U.S. 66 (1986)	46, 47
United States v. *Miller*, 471 U.S. 130 (1985)	10, 12, 14, 15
United States v. *Moreland*, 258 U.S. 433 (1922)	20
United States v. *Mulder*, 889 F.2d 239 (9th Cir. 1989)	42
United States v. *Novey*, 922 F.2d 624 (10th Cir. 1991)	42
United States v. *Olano*, 507 U.S. 725 (1993)	8, 44, 45
United States v. *Olson*, 716 F.2d 850 (11th Cir. 1983)	20, 39
United States v. *Promise*, 255 F.3d 150 (4th Cir. 2001), *petition for cert. filed*, No. 01-6398 (U.S. Sept. 20, 2001)	7, 8, 39, 42
United States v. *Strayhorn*, 250 F.3d 462 (6th Cir. 2001)	41
United States v. *Thomas*, 274 F.3d 655 (2d Cir. 2001)	4
United States v. *Williams*, 341 U.S. 58 (1951)	16
United States v. *Williams*, 504 U.S. 36 (1992)	25, 26
Vasquez v. *Hillery*, 474 U.S. 254 (1986)	24, 26, 27, 36, 43
Ex parte Watkins, 28 U.S. (3 Pet.) 193 (1830)	17
Weisgram v. *Marley Co.*, 528 U.S. 440 (2000)	48
Whitus v. *Georgia*, 385 U.S. 545 (1967)	27
Ex parte Wilson, 114 U.S. 417 (1885)	14
In re Winship, 397 U.S. 358 (1970)	3, 31
Wong Wing v. *United States*, 163 U.S. 228 (1896)	15
Wood v. *Georgia*, 370 U.S. 375 (1962)	25

CONSTITUTION AND STATUTES

U.S. Const. amend. V	1, 24
amend. VI	1

TABLE OF AUTHORITIES—continued

Page

18 U.S.C. § 3231 ..... 1, 13, 17, 20
21 U.S.C. § 841 ..... 2, 3, 4, 8
§ 846 4

RULES

Fed. R. Crim. P. 6(d) 47
12(b)(2) 10, 20
52(b) 2, 8, 38, 43, 44

SCHOLARLY AUTHORITIES

Sara Sun Beale et al., *Grand Jury Law and Practice* (2d ed. 2001) 28, 29, 30
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Black's Law Dictionary (6th ed. 1990) 15
1 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787* (Jonathan Elliott, ed., Ayer Co. 1987) (1888) 30

TABLE OF AUTHORITIES—continued

Page

2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787* (Jonathan Elliott, ed., Ayer Co. 1987) (1888) 30
English Liberties, or the Free-born Subject's Inheritance (Henry Care ed., 4th ed. 1719) 28, 29
1 *Pamphlets of the American Revolution* (Bernard Bailyn ed., 1965) 29

OPINIONS BELOW

The opinion of the court of appeals is reported at 261 F.3d 397. Pet. App. 1a-35a. The district court's judgments are unreported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on August 10, 2001. The petition for a writ of certiorari was filed on October 31, 2001, and was granted on January 4, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation . . . .

18 U.S.C. § 3231

> The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

> Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

21 U.S.C. § 841

The text of this statute is reproduced in the Appendix to the Petition at 36a-46a.

Federal Rule of Criminal Procedure 52

> Rule 52. Harmless Error and Plain Error
>
> (a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF THE CASE

The issue in this case is whether a reviewing court may correct an error when a district court sentenced a defendant for an offense that was neither charged in the indictment nor presented to the petit jury because an essential element of the offense was instead supplied by the sentencing judge using an improper standard of proof. This series of mistakes denied respondents their rights under the Fifth and Sixth Amendments to have each element of an offense presented to a grand jury and found by a petit jury beyond a reasonable doubt. Petitioner admits that it was "plain error" to omit an essential fact, drug quantity, from the indictment and from the elements submitted to the petit jury for a finding, and it admits that plain error occurred when the sentencing judge used the preponderance of the evidence standard to find this element.

Petitioner nevertheless claims that this Court should ignore these fundamental errors. To do so would reduce the grand

jury to superfluity and defy the basic guarantees afforded to criminal defendants by the Constitution and protected by this Court's decisions. Petitioner's argument would require this Court to overrule its own precedent that a court cannot exceed its jurisdiction by sentencing a defendant for an offense not charged in the indictment. *Ex parte Bain*, 121 U.S. 1 (1887). Moreover, petitioner would have this Court disregard its recent holding that elements of criminal offenses must be presented to a petit jury and proven beyond a reasonable doubt. *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000); see also *In re Winship*, 397 U.S. 358, 364 (1970). Finally, petitioner's argument would require this Court to hold that sentencing respondents for an offense whose elements were not properly charged in the indictment, based on a finding made by the sentencing judge under a preponderance of the evidence standard, did not affect the integrity, fairness, or public reputation of the judicial proceeding. Such a holding would be untenable when the mistakes in this case undermined the very foundation of the criminal trial. The litany of constitutional errors that flowed from the initial charging decision in this case demonstrates the foundational importance of the grand jury indictment. Petitioner's attempt to let these errors go uncorrected would eviscerate the protections embodied in the grand jury guarantee.

A. Background

The grand jury charged respondents with a conspiracy to commit a drug offense prohibited by 21 U.S.C. § 841. Section 841(a) makes it "unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a)(1). Section 846 sets out the offense of conspiracy and provides that "[a]ny person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission

of which was the object of the attempt or conspiracy." *Id.* § 846.

Subsection 841(b), in turn, provides a gradation of drug amounts and penalties in controlled substance offenses and states that "any person who violates subsection (a) of this section shall be sentenced as follows." *Id.* § 841(b). The penalties begin with a term of imprisonment "which may not be less than 10 years or more than life" under § 841(b)(1)(A); the relevant part of this subsection applies to possession of 50 grams or more of cocaine base. Subsection 841(b)(1)(B) provides a penalty "which may not be less than 5 years and not more than 40 years" for 5 or more grams of cocaine base. Subsection 841(b)(1)(C) is the "catchall" provision that applies to all other violations of § 841(a) involving schedule I or II substances; it sets a term of imprisonment capped at 20 years without regard to drug quantity.

While respondents' appeal was pending, this Court decided *Apprendi* v. *New Jersey*, 530 U.S. 466 (June 26, 2000). In *Apprendi*, the Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. The *Apprendi* decision followed this Court's decision in *Jones* v. *United States*, 526 U.S. 227 (Mar. 24, 1999) (also decided while respondents' appeal was pending), which expressed doubt about the constitutionality of allowing penalty-enhancing findings to be determined by a judge by a preponderance of the evidence. *Id.* at 243 n.6. Since this Court's decision in *Apprendi*, most courts of appeals that have analyzed the federal drug statute have held that the quantity of drugs must be alleged in the indictment and proven to a petit jury beyond a reasonable doubt. See *United States* v. *Thomas*, 274 F.3d 655, 663 (2d Cir. 2001) (en banc) (citing cases from seven other circuits); but see *United States* v. *Bjorkman*, 270 F.3d 482, 492 (7th Cir. 2001) (stating merely

that "'a post-*Apprendi* indictment *should* specify . . . the events listed in § 841(b) on which the prosecutor relies to establish the maximum sentence'"), *petition for cert. filed*, No. 01-8356 (U.S. Jan. 25, 2002). Petitioner does not challenge either of these conclusions. See Pet. Br. 7-11.

B. The District Court Proceedings

In March 1998, a federal grand jury in the District of Maryland returned a superseding indictment charging respondents and others with a single count of conspiracy to distribute and to possess with the intent to distribute cocaine and cocaine base. The indictment did not allege the amount of drugs involved. Instead, it mentioned a "detectable amount of" the controlled substances.[1] The charge arose out of an investigation of a drug organization in Baltimore, Maryland. Authorities seized currency, weapons, drug paraphernalia, approximately 380 grams of cocaine base, and approximately 84 grams of cocaine hydrochloride during searches of several houses and the arrests of respondents. Pet. App. 6a. Prosecutors charged the respondents in the single-count indictment, which cited only 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846. J.A. 59, 62.

Respondents pleaded not guilty, and a jury trial commenced on August 31, 1998. C.A. J.A. 42. During the trial, the district court instructed the jury that "as long as you find that a defendant conspired to distribute or possess[] with intent to distribute these controlled substances, the amounts involved are not important." Supp. C.A. App. 13. On November 9, 1998, the jury acquitted one defendant but found the seven respondents guilty of a conspiracy to distribute and possess with intent to distribute the controlled substances at issue.

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[1] The indictment that had been superseded alleged that the conspiracy concerned 5 or more kilograms of cocaine and 50 or more grams of cocaine base. J.A. 47-57. The superseded indictment charged different dates for the conspiracy and included fewer defendants. *Id.* at 58-63.

C.A. J.A. 54. In accordance with the court's instructions, the jury never made any finding regarding the quantity of drugs involved.

At sentencing, the district court turned to the evidence on drug amounts. Consistent with pre-*Apprendi* practice, respondents objected to the quantities of drugs alleged. They challenged the veracity of the prosecution's witnesses and the quantity attributed to them as "reasonably foreseeable," but the judge, applying a preponderance of the evidence standard, found that more than 1.5 kilograms of cocaine base were attributable to each of six of the respondents from their participation in the conspiracy.[2] The court sentenced five respondents, Stanley Hall, Jr., Leonard Cotton, Lamont Thomas, Marquette Hall, and Jesus Hall, to a term of life imprisonment, the maximum term under 21 U.S.C. § 841(b)(1)(A). Jovan Powell received a 30-year term of imprisonment based on the same finding, and Matilda Hall received 30 years of imprisonment based on a finding, under the preponderance of the evidence standard, that she was responsible for less than 1.5 kilograms of cocaine base but more than 500 grams.[3]

Respondents filed timely notices of appeal between March 1 and March 12, 1999. C.A. J.A. 852-54, 867, 888-91. On March 3, 2000, respondent Lamont Thomas, subsequently joined by the other respondents, filed a motion for a new trial on the basis of newly discovered evidence, *id.* at 67: the Special Assistant United States Attorney on the case had

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[2] For objections, *see* C.A. J.A. 477-79 (Marquette Hall), 479-84 (Leonard Cotton), 551-57 (Lamont Thomas), 610-14, 618-26 (Matilda Hall), 680-83, 713 (Jesus Hall), 755-56 (Jovan Powell), 781-82, 788 (Stanley Hall, Jr.). For findings, *see id.* at 822-25 (Stanley Hall, Jr.), 573-74 (Lamont Thomas), 507 (Leonard Cotton), 723 (Jesus Hall), 505 (Marquette Hall); 769 (Jovan Powell).

[3] *See* C.A. J.A. 831-44, 855-87 (respondents' sentences), 667-68 (finding for Matilda Hall).

testified in a related state court proceeding that one of the prosecution's principal witnesses in the federal case had lied at trial. *Id.* at 985, 979. The district court nevertheless denied the motion for a new trial. *Id.* at 69.

C. The Court Of Appeals Decision

As relevant here, respondents appealed their convictions because their sentences were invalid under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). *Apprendi* had been decided after their sentencing but while their appeal was pending. Petitioner conceded that there had been an *Apprendi* error because the drug quantity element had not been presented to the grand jury or found by the petit jury beyond a reasonable doubt. See *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987) (a new rule for criminal prosecutions applies to all cases pending on direct review). Nevertheless, petitioner asserted that respondents had forfeited the argument by not raising it at trial, and the error should be reviewed under the plain-error standards of Federal Rule of Criminal Procedure 52(b). According to petitioner, the court should, under its discretionary authority, ignore the error because there was evidence that would have supported a jury determination of guilt for the offense for which respondents were sentenced but never charged.[4]

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[4] The government's position on these issues has wavered since *Apprendi*. In some post-*Apprendi* litigation, the government has argued that the facts referenced in subsection (b) (relating to quantities) of § 841 are mere sentencing factors that need not be charged in the indictment, a position it has now abandoned. *See United States* v. *Promise*, 255 F.3d 150, 182-84 (4th Cir. 2001) (en banc) (Luttig, J., concurring in judgment), *petition for cert. filed*, No. 01-6398 (U.S. Sept. 20, 2001). It is also maintaining in a separate case before this Court that "[i]f the legislature could provide for judicial fact-finding by a preponderance of the evidence of facts that increase the *maximum* punishment beyond that authorized by the jury's verdict, then . . . . [i]n federal cases, such a rule would also bypass the grand jury's role in finding probable cause." Resp. Br. at 27,

The Fourth Circuit, however, determined that the error was jurisdictional in nature. Following *Ex parte Bain*, 121 U.S. 1 (1887), and *Stirone* v. *United States*, 361 U.S. 212 (1960), the court of appeals held that a court does not have jurisdiction over an offense that is not alleged in the indictment. The district court therefore exceeded its jurisdiction when it sentenced the appellants for a crime for which they were never charged, "thus depriving them of the constitutional right to 'answer' only for those crimes presented to the grand jury." Pet. App. 11a.

The court of appeals then applied a plain-error analysis to determine whether the error should be corrected. Under plain-error review, an error must be plain, it must affect a defendant's substantial rights, and it must affect the integrity, fairness, or public reputation of the proceeding before the court may choose to correct it. Fed. R. Crim. P. 52(b); *United States* v. *Olano*, 507 U.S. 725, 736 (1993). The court followed circuit precedent in *United States* v. *Promise*, 255 F.3d 150, 160-62 (4th Cir. 2001) (en banc), *petition for cert. filed*, No. 01-6398 (U.S. Sept. 20, 2001), which held that drug quantity "must be treated as an element of an aggravated drug trafficking offense" (*i.e.*, § 841(b)(1)(A)) under 21 U.S.C. § 841, *Promise*, 255 F.3d at 156, and the failure to charge a specific threshold drug quantity in the indictment and to submit the quantity issue to the jury constituted plain error. *Id.* at 160, *cited in* Pet. App. 8a. The court of appeals in the instant case concluded that the error "affects defendants' substantial rights where, as here, the defendants are sentenced to a term of imprisonment greater than that set forth in section 841(b)(1)(C) for a conviction based on an undetermined quantity of drugs." Pet. App. 8a (citing *Promise*, 255 F.3d at 160-62).

Harris v. *United States*, No. 00-10666 (U.S. filed Feb. 22, 2002) (citation omitted).

The court of appeals "ha[d] no trouble concluding" that the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." Pet. App. 14a. It explained that the lower court was acting "without jurisdiction," and pointed to the "fundamental nature of the error—namely that '[the defendant] was held accountable in a federal court for an "infamous crime" for which he was never indicted by a grand jury.'" *Id.* (alteration in *Cotton*) (citing *United States* v. *Floresca*, 38 F.3d 706, 713-14 (4th Cir. 1994) (en banc)). The court of appeals ruled that it "should exercise [its] discretion to recognize the error." *Id.* at 8a. Noting that the Supreme Court had elected to exercise its discretion to correct a forfeited error when a defendant was convicted for a crime not listed in the indictment, *Silber* v. *United States*, 370 U.S. 717 (1962) (per curiam), the court of appeals decided to notice an error "under the equally (or possibly more) egregious circumstance where a defendant is sentenced based upon a crime that was not charged in the indictment *nor even presented to the petit jury*." Pet. App. 13a.

The court of appeals rejected the argument that it should decline to recognize the error on the basis of evidence that a jury might have relied upon to make findings against the defendants. In doing so, the court stated that "the quantum of evidence is not a relevant consideration when the error stems from a defect in the indictment." Pet. App. 15a. First, regarding the absence of a finding of probable cause at the outset, the court held that "a reviewing court may not speculate about whether a grand jury would or would not have indicted a defendant for a crime with which he was never charged" because to do so would usurp the role of the grand jury. *Id.* (citing *Vasquez* v. *Hillery*, 474 U.S. 254, 263 (1986), and *Promise*, 255 F.3d at 190 (Motz, J., joined by Widener, Michael, and King, JJ.)). Second, responding to the assertion that a petit jury would have convicted defendants if

the quantity element had been presented, the court explained that:

> the government's position ignores the basic principle that the grand jury and petit jury are separate and independent. Because it is well settled that the petit jury cannot usurp the role of the grand jury, it is no less evident that we cannot place ourselves in the position of the petit jury, and then, in turn, assume the role of the grand jury. In effect, this would result in nothing less than a constructive amendment of the indictment which itself is reversible plain error.

Id. at 16a (citation omitted).

After concluding that the error would affect the "fairness, integrity or public reputation of judicial proceedings" where the grand jury's role had been usurped, Pet. App. 8a (internal quotation marks omitted), the court vacated the respondents' sentences and remanded "with instructions to sentence the appellants . . . to a term of imprisonment not to exceed 20 years." *Id.* at 16a.

SUMMARY OF ARGUMENT

The judgment of the court of appeals should be affirmed for three reasons. First, a district court's jurisdiction is limited to the offenses charged in the indictment. *Ex parte Bain*, 121 U.S. 1, 12-13 (1887); see also *United States* v. *Miller*, 471 U.S. 130, 144 (1985). In this case, the district court exceeded its jurisdiction when it sentenced respondents for an offense that was not charged in the indictment and therefore never presented to the petit jury for a finding. A jurisdictional error can be noticed by the court at any time, and it requires correction. Fed. R. Crim. P. 12(b)(2). The court of appeals properly vacated the sentences in this case, although its analysis of the error under the discretionary plain-error

standard was unnecessary because the nature of the error mandated correction.

Second, the court of appeals' judgment also should be affirmed because the errors in this case fall into a class of fatal flaws known as "structural errors" that "affect[] the framework within which the trial proceeds." *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991). These errors "are so intrinsically harmful as to require automatic reversal." *Neder* v. *United States*, 527 U.S. 1, 7 (1999). Specifically, this Court has held that reversal is necessary when a court proceeds against a defendant for a charge that was not in the indictment, even if the error has been forfeited. *Silber* v. *United States*, 370 U.S. 717 (1962) (per curiam). In addition, application of an improper standard of proof constitutes a separate structural error under *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993). Contrary to petitioner's arguments, the defects in this proceeding are unrelated to the errors in *Neder* v. *United States*, 527 U.S. 1 (1999), and *Johnson* v. *United States*, 520 U.S. 461 (1997), which involved the flawed presentation of a case to the petit jury, rather than errors in the indictment, sentencing, and standard of proof.

Third, the errors in this case warrant correction under harmless-error or plain-error review. This Court has held that proceeding against a defendant for an offense not charged in the indictment can never be harmless error. *Stirone* v. *United States*, 361 U.S. 212 (1960). Petitioner tries to avoid the result of this holding by arguing that the claim of error in this case was forfeited and is subject to plain-error review. Respondents, however, objected to drug quantity at the earliest possible moment in the proceedings—when the prosecution first sought to establish the quantity element at sentencing. Petitioner's argument that the objection was forfeited in fact supports respondents' case. It demonstrates that the charging function of the grand jury had been ignored and the critical element, upon which respondents'

punishments were to be determined, was not presented until sentencing and accordingly was decided using the wrong standard of proof.

In all events, the court of appeals' judgment should be affirmed because an increase in respondents' sentences from 20 years to life, or from 20 years to 30 years, deprived respondents of a significant liberty interest. Moreover, the integrity, fairness, and public reputation of the proceeding were seriously affected by the Fifth and Sixth Amendment violations in this case. To reach this conclusion, it is unnecessary to examine the quantity or quality of the evidence adduced at sentencing. The discretion to correct such systemic errors does not depend on a defendant's innocence or guilt. In accordance with the carefully crafted structure of our criminal process, the government's failure to present such evidence to the grand jury and obtain a separate, greater charge in an indictment warrants vacatur of respondents' sentences.

ARGUMENT

I. A SENTENCING COURT'S JURISDICTION IS LIMITED TO THE OFFENSES CHARGED IN THE INDICTMENT.

A. The Error In This Case Is Jurisdictional Because The Indictment Defines The Scope Of The District Court's Power.

An "indictment found by a grand jury [is] indispensable to the power of the court to try the petitioner for the crime with which he was charged." *Ex parte Bain*, 121 U.S. 1, 12-13 (1887). For this proposition, "[t]he *Bain* case . . . has never been disapproved." *Stirone* v. *United States*, 361 U.S. 212, 217 (1960); see also *United States* v. *Miller*, 471 U.S. 130, 144 (1985). In this case, the district court sentenced respondents for an offense that was not charged in the

indictment or tried to the petit jury. When the district court imposed a sentence that exceeded the statutory maximum of the charged offense, based on an element of another offense that was not charged, it exceeded its jurisdiction. The sentence imposed by the district court must therefore be set aside.

A formal accusation is essential for every criminal trial, and without it, the court has no jurisdiction to proceed. *Post* v. *United States*, 161 U.S. 583, 587 (1896); *Albrecht* v. *United States*, 273 U.S. 1, 7 (1927). In order to charge an offense, an indictment must allege every element of the offense. *Hamling* v. *United States*, 418 U.S 87, 117 (1974); *Russell* v. *United States*, 369 U.S. 749, 763 (1962). If the indictment fails to include an essential element or fact, the defendant cannot be convicted or sentenced for that offense. *Russell*, 369 U.S. at 771-72; *Ball* v. *United States*, 140 U.S. 118, 136 (1891). The indictment's charges may only be broadened by the grand jury itself, and if the court allows an actual or constructive amendment to the indictment, the error is reversible. *Stirone*, 361 U.S. at 215-17.

Although 18 U.S.C. § 3231 grants jurisdiction to district courts over crimes against the United States, it does not confer a grant of roving jurisdiction for the district court to convict and sentence a defendant for any crime that may be supported by the evidence. Jurisdiction over a *particular* offense is essential to the validity of a criminal prosecution and the legality of a sentence, and that jurisdiction is conferred and defined in a formal charging document. *Bain*, 121 U.S. at 13-14.

This Court's decision in *Bain* is instructive. There, the Court reversed a conviction when a defendant had been convicted and sentenced based on an indictment amended without the grand jury. *Id.* In his habeas proceeding, the defendant argued that the court had lost its jurisdiction when the indictment was amended without presentation to the grand

jury. This Court agreed, holding that "this change in the indictment deprived the court of the power of proceeding to try the petitioner and sentence him to the imprisonment provided for in the statute." *Id.* at 13. As this Court explained:

> if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the Constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists. It is of no avail, under such circumstances, to say that the court still has jurisdiction of the person and of the crime; for though it has possession of the person, and would have jurisdiction of the crime, if it were properly presented by indictment, the jurisdiction of the offence is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment.

Id.

In *United States* v. *Miller*, this Court narrowed *Bain*'s holding but reasserted the principle of "the impermissibility of actual additions to the offenses alleged in an indictment." 471 U.S. at 144. The Court explained that this was "a proposition we have repeatedly reaffirmed." *Id.* "[A] conviction cannot stand if based on an offense that is different from that alleged in the grand jury's indictment." *Id.* at 142. See also *Ex parte Wilson*, 114 U.S. 417, 429 (1885) ("the District Court, in holding the petitioner to answer for such a crime, and sentencing him to such imprisonment, without indictment or presentment by a grand jury, exceeded its jurisdiction"); *Libretti* v. *United States*, 516 U.S. 29, 56 (1995) ("the law alone defines the limits of a court's power to enter a judgment . . . . [E]xtrastatutory punishments implicate the very power of a court to act") (citations omitted) (Stevens,

J., dissenting); cf. *Wong Wing* v. *United States*, 163 U.S. 228, 238 (1896) (finding that the immigration commissioner, in sentencing appellants to hard labor without a grand jury indictment, "acted without jurisdiction").

Petitioner embarks on a long digression about the evolution of habeas review in an effort to distinguish *Bain*. Whatever the history of habeas review,[5] however, *Bain*'s holding that a defendant cannot be tried for charges that were not in the indictment remains good law and has been reaffirmed by this Court decades after the changes to habeas corpus law that petitioner invokes as a basis for ignoring *Bain*. See *Miller*, 471 U.S. at 144; *Stirone*, 361 U.S. at 217. Petitioner asserts that *Bain* is among a series of old cases in which the Court invoked the phrase "jurisdictional error" to describe something other than "jurisdiction" in its current sense, which is the "[p]ower and authority of a court to hear and determine a judicial proceeding; and power to render [the] particular judgment in question." *Black's Law Dictionary* 853 (6th ed. 1990). While some cases may use the term "jurisdiction" in an obsolete sense, in *Bain* the term was used just as it is used in today's jurisprudence to denote the scope of a court's power: the *Bain* Court determined that the lower court lacked power to proceed against a defendant for a crime that was not in the indictment presented by the grand jury. Nothing has changed in this meaning of the term in *Bain*, nor in its application to the facts in this case. If the Court were to adopt petitioner's argument in this case that the district court had jurisdiction to sentence respondents for an offense that was

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[5] Petitioner's resort to this argument on habeas history to distinguish *Bain*, see Pet. Br. at 41-42, underscores the fact that *Bain* remains good law and controls this case. A case does not disappear just because the years pass. *See, e.g.*, *Carmell* v. *Texas*, 529 U.S. 513, 534 (2000) (declining the United States' suggestion to abandon part of the *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1789), definition of ex post facto criminal laws, in spite of its apparent disuse).

not in the indictment, it would have to overrule the *Bain* line of cases.

Petitioner's reliance on *Lamar* v. *United States*, 240 U.S. 60 (1916), and *United States* v. *Williams*, 341 U.S. 58 (1951), is misplaced, Pet. Br. at 39-40: both cases turned on statutory interpretation, and neither involved an indictment that omitted elements of a crime. In *Lamar*, a defendant claimed that he could not be convicted under a statute that prohibited impersonating an officer of the United States. 240 U.S. at 64. Accused of impersonating a Congressman, defendant proffered the legal argument that a Congressman was not an officer of the United States, and therefore the court did not have jurisdiction over the case. This Court determined that this argument went "only to the merits of the case" and not to the jurisdiction of the court. *Id.* at 65; see also *Lamar* v. *United States*, 241 U.S. 103, 116 (1916). The instant case, in contrast, is not about whether the prosecution's charge is legally flawed, but about whether a court can sentence a defendant for an offense that was never charged in the indictment.

Similarly, in *United States* v. *Williams*, 341 U.S. 58 (1951), a defendant who had been tried on several charges, including conspiracy, was later indicted for perjury committed during his trial. *Id.* at 59-60. He challenged the perjury indictment by collaterally attacking his first trial: he claimed that the conspiracy statute in his first trial did not reach his conduct, so the first district court lacked jurisdiction, and he could not have committed perjury during the conspiracy portion of his trial, which was in effect void. This Court agreed that the conspiracy statute did not reach defendant's conduct, but it disagreed that the trial court's jurisdiction was affected. *Id.* at 69. There was no allegation that elements of the offense had not been properly charged in the indictment. In contrast, the jurisdictional problem in the instant case arises because the district court attempted to proceed against respondents for a

crime whose elements were *not* in the indictment. In other words, *Lamar* and *Williams* stand for the proposition that a court does not lose jurisdiction over a case when the defendant argues that the elements charged in the indictment cannot be proved. These cases therefore do not undermine the conclusion that a district court lacks jurisdiction over a charge—even if it might be proved—when it has not been included in a grand jury indictment.[6]

B. Failure To Charge An Element Of The Crime In A Charging Document Is A Jurisdictional Defect That Cannot Be Waived.

A charging document, whether an information or an indictment, is essential to perfect the general grant of jurisdiction under 18 U.S.C. § 3231 and establish jurisdiction over a particular offense in a prosecution. *Albrecht*, 273 U.S. at 8. Even if a defendant agrees to waive a grand jury indictment, he cannot waive jurisdiction. "A person may not be punished for a crime without a formal and sufficient accusation even if he voluntarily submits to the jurisdiction of the court." *Albrecht*, 273 U.S. at 8 (stating that an invalid indictment "necessarily deprive[s] the court of jurisdiction of the proceeding in which it was made") (citing *Bain*, 121 U.S. 1). Criminal cases are not an exception to the rule that parties cannot manufacture jurisdiction. *Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149, 152 (1908). The fact that a defendant can choose to proceed by information does not operate to confer jurisdiction on the district court beyond the

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[6] Petitioner's reliance on *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830), Pet. Br. at 41, is similarly unavailing. In that case, the Court held that habeas review did not allow it to inquire into potential errors in a trial court's judgments. 28 U.S. (3 Pet.) at 203. Moreover, there was no allegation that the indictments in the case omitted elements, or that the defendant was convicted of a crime other than the ones stated in the indictments. *Id.* at 201.

prosecution's charging document, be it an indictment or an information.

Neither method of initiating federal criminal charges against an individual impairs the foundational principle that "[t]he Constitution gives a criminal defendant the right to demand that a jury find him guilty of all of the elements of the crime with which he is charged." *United States* v. *Gaudin*, 515 U.S. 506, 511 (1995). Whether the prosecution elects to proceed by indictment or by information, the primacy and jurisdictional necessity of the charge—setting forth all of those elements and only those elements for which the defendant will be held to answer before the petit jury—is not affected. If, for instance, a defendant is charged by indictment or information with assault, the court cannot of its own accord convict or sentence the defendant for murder, regardless of how much evidence of murder is adduced during the trial. See *Stirone*, 361 U.S. at 217. Jurisdiction over the charge is essential; even if a defendant waives the right to a grand jury indictment, a federal district court would not thereby gain jurisdiction over any state law violation charged in an information. Furthermore, respondents in the instant case did *not* waive indictment; they entered pleas of not guilty and contested the prosecution's case from arraignment through sentencing.

Where an indictment charges an offense, as the indictment in this case charged an § 841(b)(1)(C) offense, the district court has the authority to adjudicate the merits of that charge, but it does not have the power to convict or sentence a defendant for an offense that was not actually charged in the indictment. The district court's jurisdiction was restricted to the offense whose elements were properly charged in the indictment.

C. A Sentence Above The Statutory Maximum Of The Indictment Offense Exceeds The Court's Power.

A district court must have the power to render a particular sentence in a case. *In re Bonner*, 151 U.S. 242, 257 (1894). The statutory violation charged in the indictment establishes the limits on the exercise of that power. If the statute provides for a maximum sentence of 20 years, a sentence greater than 20 years exceeds the court's power. The *Apprendi* Court, while not directly considering the indictment question, stated that the "judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury." *Apprendi* v. *New Jersey*, 530 U.S. 466, 483 n.10 (2000). *Apprendi* merely confirmed the time-honored rule that even "[i]f the court is authorized to impose imprisonment" for the crime on which the defendant has been indicted and convicted, if the term of imprisonment "exceeds the time prescribed by law, the judgment is void for the excess." *Bonner*, 151 U.S. at 254, 258.

In *Bonner*, this Court explained that a court, whether rendering judgment or "taking custody of the accused," must "keep[] within the limitations prescribed by the law . . . . When the court goes out of these limitations, its action, to the extent of such excess, is void." *Id.* at 257. The Court rejected the proposition advanced by the government that "if the court has authority to inflict the punishment prescribed, its action is not void, though it pursues any form or mode which may commend itself to its discretion." *Id.* at 258.[7]

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[7] *See also In re Mills*, 135 U.S. 263, 270 (1890) (vacating a sentence to imprisonment in a penitentiary because the law did not authorize such imprisonment for the term of the sentence; therefore the "court below was without jurisdiction to pass any such sentences, and the orders directing the sentences of imprisonment . . . are void."); *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 177 (1873) (holding that where the court did not have the power to punish a defendant, the punishment was "void . . . because in

The grant of general subject matter jurisdiction over federal criminal offenses, see 18 U.S.C. § 3231, does not give district courts the power to sentence for crimes not alleged in the indictment, or to sentence defendants to penalties not authorized by the statute. If the district court acts outside of its power, these actions cannot stand. A sentence imposed for an offense that was not charged must be vacated. *United States* v. *Moreland*, 258 U.S. 433, 437 (1922) (holding a defendant's sentence "void because of the inclusion therein of the punishment of hard labor, he not having been presented or indicted by a grand jury"). Cf. *Hardy* v. *United States*, 691 F.2d 39, 41 (1st Cir. 1982) (holding that if a recidivism-enhanced sentence was imposed without the statutorily required information on prior convictions, it would have to be vacated because the court would have acted "without authority") (Breyer, J.).

The discretionary nature of harmless-error or plain-error review is logically incompatible with jurisdictional error. Federal Rule of Criminal Procedure 12(b)(2) states that a court "shall" notice at any time an error if the indictment "fails to show jurisdiction in the court or to charge an offense." Fed. R. Crim. P. 12(b)(2); cf. *United States* v. *Olson*, 716 F.2d 850, 853 (11th Cir. 1983) (holding that "[h]armless error cannot give the district court authority that it does not possess" and remanding for re-sentencing). As Rule 12(b)(2) makes clear, a jurisdictional defect is one that may be raised at any time and that must be corrected. See *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) ("'if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it'") (quoting

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excess of the authority of the court"), *double jeopardy holding limited by United States* v. *DiFrancesco*, 449 U.S. 117, 139 (1980); *Bigelow* v. *Forrest*, 76 U.S. (9 Wall.) 339, 351 (1869) (stating that a court "would have transcended its jurisdiction" if it had ordered forfeiture beyond that authorized by statute).

United States v. *Corrick*, 298 U.S. 435, 440 (1936)). To hold otherwise would shift the authority to make "probable cause" findings to the prosecutor, who could then make an end-run around the jurisdictional prerequisite of an indictment by bringing new and greater charges.

No amount of evidence can confer jurisdiction on a court that lacks jurisdiction. Even if a petit jury finds a defendant guilty of an offense, a finding not made in this case for § 841(b)(1)(A), a guilty verdict cannot "confer jurisdiction on the court where none existed. Neither instructions nor a petit jury verdict can satisfy after the fact the Fifth Amendment right to be tried upon charges found by a grand jury." *United States* v. *Hooker*, 841 F.2d 1225, 1232 (4th Cir. 1988). If a petit jury's verdict of guilt, or a defendant's own guilty plea, do not allow the court to overlook a jurisdictional defect; a post-trial weighing of the evidence cannot cure a jurisdictional defect. Indeed, such speculation by a court about what a grand jury might have decided if it had been presented with a charge defeats the purpose of the grand jury. See *Russell*, 369 U.S. at 770. The evidence presented to the sentencing judge in this case cannot create jurisdiction over an offense that was neither charged in the indictment nor presented to the petit jury for a finding.

In this case, the language of the indictment stated an offense under § 841(b)(1)(C) (*i.e.*, an offense involving an unspecified quantity of drugs). The sentencing court sentenced respondents for a § 841(b)(1)(A) offense (a quantity-specific offense). These are wholly separate offenses. See *Jones* v. *United States*, 526 U.S. 227, 252 (1999). Because the offense charged in the indictment limited the scope of the district court's power, when the court sentenced respondents to terms above the § 841(b)(1)(C) statutory maximum term, it exceeded its jurisdiction and the excess terms were void.

II. IMPOSING A SENTENCE THAT WAS NOT PERMITTED UNDER THE INDICTMENT IS SO INTRINSICALLY HARMFUL AS TO CONSTITUTE STRUCTURAL ERROR REQUIRING REVERSAL.

A. This Court Has Found That Indictment Errors Warrant Reversal, Regardless Of Their Forfeiture.

Assuming that the error was not jurisdictional, the inadequacy of the indictment still was reversible error. In *Silber* v. *United States*, 370 U.S. 717 (1962) (per curiam), this Court concluded that a defective indictment was reversible error, even though the defendant failed to raise the error in the court of appeals or in the Supreme Court. *Id.* at 717-18.[8] *Silber* was a short opinion, but the inference that supported its straightforward conclusion was amplified in *Stirone* v. *United States*, 361 U.S. 212 (1960), where the Court reversed a conviction that had been entered upon an indictment amended without the grand jury. *Id.* at 219. The Court explained that the Fifth Amendment grand jury guarantee has as its purpose "to limit [an accused's] jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." *Id.* at 218. If the defendant is convicted and sentenced for an offense that was not charged in the indictment, the error "destroy[s] the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error." *Id.* at 217. Although *Stirone* focused on a preserved claim of error, *Silber* demonstrates that the same reasoning compels reversal even when the error was forfeited.

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[8] The error had been raised in the district court. *Silber*, 370 U.S. at 717.

Contrary to petitioner's argument, this Court did not overrule these cases in *Chapman* v. *California*, 386 U.S. 18 (1967). See Pet. Br. at 32-33. In *Chapman*, the Court ruled that *some* constitutional errors may be subject to harmless-error review, but confirmed that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." 386 U.S. at 23. Indeed, for over a century this Court has in an unbroken line of precedent protected the grand jury right by reversing indictment errors. In *Bain*, the Court reversed a conviction obtained when an indictment was amended by the prosecutor, with the trial court's consent: "after [an] indictment [is] changed it [is] no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney." *Ex parte Bain*, 121 U.S. 1, 13 (1887). In *Stirone*, this Court reversed a Hobbs Act conviction obtained after an indictment had been constructively amended without the grand jury. *Stirone*, 361 U.S. at 214-15. While minor indictment errors that do not expand the charges of the indictment are not construed as constructive amendments, changing the charges after the grand jury has returned an indictment does direct violence to the integrity of the criminal process. In *Russell*, the Court reversed petitioners' convictions when the indictment had omitted a key fact in the charges against them. *Russell* v. *United States*, 369 U.S. 749 (1962). The Court reaffirmed "the settled rule in federal courts," *id.* at 770, that defendants have to be tried on an indictment returned by the grand jury, and not on later charges made by the court or prosecutors.

> "[I]f it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the Constitution

> places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists."

Id. at 771 (quoting *Bain*, 121 U.S. at 13). Petitioner has presented no reason for abandoning the protection this Court has accorded to the essential and plainly stated right not to be "held to answer for . . . [an] infamous crime unless on . . . indictment of a Grand Jury." U.S. Const. amend. V.

B. The Violation Of The Right To Indictment By A Grand Jury Is A Structural Error.

Although the *Silber* Court did not use the term "structural error," its reversal of the indictment error demonstrates that defective indictments fall within a class of structural errors this Court has found to be so fundamental that they require reversal. See *Sullivan* v. *Louisiana*, 508 U.S. 275, 281-82 (1993). A structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991). Such errors "undermine[] the structural integrity of the criminal tribunal itself," *Vasquez* v. *Hillery*, 474 U.S. 254, 263-64 (1986), and deprive an accused of "basic protections." *Rose* v. *Clark*, 478 U.S. 570, 577-78 (1986). The rights violated by these errors "protect important values that are unrelated to the truth-seeking function of the trial," *id.* at 587 (Stevens, J., concurring in judgment), and their deprivation has "consequences that are necessarily unquantifiable and indeterminate." *Sullivan*, 508 U.S. at 282.

The violation of the right not to be sentenced for a crime that was not charged in ~~an indictment~~ readily satisfies these criteria. This structural safeguard serves to protect not only the individual accused but also the system of justice. Its elimination therefore vitiates the legitimating mechanism for prosecution and represents a "structural defect[] in the constitution of the trial mechanism." *Fulminante*, 499 U.S. at 309. Indeed, there can be no question that bypassing this

grand jury requirement "affect[s] the framework within which the trial proceeds," rather than being "simply an error in the trial process itself." *Id.* at 310.

The right to have a group of citizens determine the validity of charges against an accused before a criminal trial may be initiated is a fundamental protection undergirding the criminal process.

> Historically, [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.

Wood v. *Georgia*, 370 U.S. 375, 390 (1962). See also *United States* v. *Calandra*, 414 U.S. 338, 343 (1974) ("The grand jury's historic functions survive to this day. Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions"). When a sentencing judge adds an element not found by the grand jury, the results are, like those of other structural errors, "necessarily unquantifiable and indeterminate." *Sullivan*, 508 U.S. at 282.

The grand jury requirement further embodies a structural allocation of powers among the judiciary, the executive, and citizenry. The Founders chose to place the power to initiate a federal criminal proceeding with the citizens—not with the judge, not with the prosecutor. "[Twelve] ordinary citizens must agree upon an indictment before a defendant is tried on a felony charge." *Gaither* v. *United States*, 413 F.2d 1061, 1066 (D.C. Cir. 1969). The grand jury "is a constitutional fixture in its own right" that "belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people." *United*

States v. *Williams*, 504 U.S. 36, 47 (1992) (internal quotation marks omitted); see also *United States* v. *Dionisio*, 410 U.S. 1, 17 (1973) (noting the grand jury's "historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor").

Petitioner asserts that the Court can ask itself what a "rational" grand jury would have decided, had the prosecution charged in the indictment the crime for which a defendant was sentenced. See, *e.g.*, Pet. Br. at 23-24. However, the very question would lead a court astray because the unique structural role of the grand jury means that the grand jury's decision not to charge cannot be modified by a prosecutor, a petit jury, or a judge, whatever the evidence may be:

> The content of the charge, as well as the decision to charge at all, is entirely up to the grand jury—subject to its popular veto, as it were. The grand jury's decision not to indict at all, or not to charge the facts alleged by the prosecutorial officials, is not subject to review by any other body.

Gaither, 413 F.2d at 1066 (footnote omitted). This Court has been careful to guard a grand jury's independence and refuse to allow "judicial reshaping of the grand jury institution, substantially altering the traditional relationships between the prosecutor, the constituting court, and the grand jury itself." *Williams*, 504 U.S. at 50. Neither the judge nor the prosecutor can know how the grand jury would have responded to a charge:

> In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count . . . all on the basis of the same facts. Moreover, "[the] grand jury is not bound to indict in every case where a conviction can be obtained."

Hillery, 474 U.S. at 263 (alteration in *Hillery*) (grand jury discrimination) (quoting *United States* v. *Ciambrone*, 601

F.2d 616, 629 (2d Cir. 1979) (Friendly, J., dissenting)). For this reason, "even if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense," the later determination cannot cure the earlier error. *Id.* at 263. No court can, by judicial fiat, fulfill the grand jury's role as a buffer separating the accused from the government. When a court interferes with or ignores the central role of the grand jury as an institution and the protection it provides a person accused by the government of committing a crime, it dissolves one of the checks and balances carefully embodied in our constitutional system.

Sentencing a defendant for an offense that was not charged in the indictment or found by a jury beyond a reasonable doubt is an error that affects "the entire conduct of the trial from beginning to end" and "the framework within which the trial proceeds." *Fulminante*, 499 U.S. at 309-10. These errors are as fundamental to the structure of the trial as other errors this Court has previously declared "structural." For instance, the "violation of the guarantee of a public trial required reversal without any showing of prejudice even though the values of a public trial may be intangible and unprovable in any particular case." *Id.* at 294-95 (discussing *Waller* v. *Georgia*, 467 U.S. 39 (1984)). If a defendant was denied counsel at trial or a grand jury free of discrimination, structural error mandates reversal. *Gideon* v. *Wainwright*, 372 U.S. 335, 345 (1963); *Whitus* v. *Georgia*, 385 U.S. 545, 553 (1967). Similarly the rights to be tried by an unbiased judge, in a community that has not been exposed to publicity highly negative to the defendant, are essential, and their denial constitutes structural error. *Tumey* v. *Ohio*, 273 U.S. 510, 535 (1927); *Sheppard* v. *Maxwell*, 384 U.S. 333, 351-52 (1966). Just as with a trial by a biased judge, the sentencing of a defendant for a crime not charged in the indictment is an error of such magnitude that it "'infect[s] the entire trial process.'" *Neder* v. *United States*, 527 U.S. 1, 8 (1999). If the right to have proposed charges reviewed by a group of

citizens, who examine the evidence for probable cause and who may modify or nullify charges for any reason, does not qualify as a structural right, then the use of the "structural error" term becomes a haphazard and unprincipled label for selected errors, while other important errors in the structure of the proceeding are ignored.

The right violated in this case is basic to our criminal justice system and traces its roots back to an English tradition more than 900 years old. Sara Sun Beale et al., *Grand Jury Law and Practice* § 1:1, at 1-1 (2d ed. 2001). Though in its early form, the grand jury acted as an instrument of the Crown, by the late seventeenth century, the English grand jury had developed a critical function as a shield against royal power. Ron S. Chun, *The Right to Grand Jury Indictment*, 26 Am. Crim. L. Rev. 1457, 1459 (1989), Beale, *supra*, § 1:2, at 1-9.[9] Commentators, citing historical precedents, explained the essential functions of the grand jury:

> To preserve the Innocent from the Disgrace and Hazards which ill Men may design to bring them to, out of Malice, or through Subornation, or other sinister Ends; for so tender is the Law, of the Reputation and Life of a Man, that it will not suffer one to be sullied . . . and the other indangered by a Trial, until first the Matter and Evidence against him have been scann'd, examined, and found by a Grand Jury, upon their Oaths, against him.

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[9] Two particular grand juries in London helped to cement the idea of the grand jury as a protection against unjust prosecutions. In 1681, the King of England, who was a secret Catholic, sought indictments against two Protestants, Stephen Colledge and the Earl of Shaftesbury, for treason. Grand juries in London refused to return the indictments. Chun, *supra*, at 1460-61 & n.36; George J. Edwards, Jr., *The Grand Jury* 28-31 (AMS Press Inc. 1973) (1906). These refusals to indict symbolized the grand jury's growing role as a barrier between the accused and the accuser and inspired commentators such as Henry Care in his *English Liberties, or the Free-born Subject's Inheritance* 252 (4th ed. 1719), *see infra*.

English Liberties, or the Free-born Subject's Inheritance 252 (Henry Care ed., 4th ed. 1719).

The English brought the grand jury to the American colonies, where the institution expanded beyond the traditional grand inquest functions to take on legislative and other powers, at least partly in order to assert control over local government. Grand juries inspected the condition of the highways, reported on the use of public funds, and suggested civic reforms. Marvin E. Frankel & Gary P. Naftalis, *The Grand Jury: An Institution on Trial* 10-11 (1977); Leroy D. Clark, *The Grand Jury: The Use and Abuse of Political Power* 14-15 (1975).

In the meantime, British publications extolling the grand jury as a bulwark of rights and freedoms found their way to America and encouraged the increasingly discontented colonists in their protests against British authority.[10] Indeed, grand juries played an important role in the Revolution, even thwarting enforcement of unpopular laws and adopting patriotic resolutions denouncing the British. Beale, *supra*, § 1:3, at 1-15. Royal prosecutors were understandably disenchanted with the grand juries of America, and attempted to proceed by information. After the Revolution, each of the new states adopted indictment by grand jury as the principal method of bringing criminal charges. *Id.* § 1:4, at 1-14 to 1-15; Chun, *supra*, at 1462-64.

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[10] Care's book, *supra*, was reprinted in Boston in 1721 and in Providence in 1774. *See* 1 *Pamphlets of the American Revolution* 742-43 n.9 (Bernard Bailyn ed., 1965). In a famous incident of resistance, a grand jury twice refused to indict the publisher of the *New York Weekly Journal*, John Peter Zenger, who had criticized the royal governor and his administration in the *Journal* in the 1730s. Clark, *supra*, at 18; Chun, *supra*, at 1461. Grand jurors also refused to return indictments against leaders of the Stamp Act revolt. Chun, *supra*, at 1462; Frankel & Naftalis, *supra*, at 11.

It was against this backdrop that the Constitution and Bill of Rights were framed. The Constitution did not require separate federal inferior courts and therefore did not include a grand jury right. The judicial provisions of the Constitution were left deliberately vague in order to avoid inciting the resistance of many states, which were wary of the creation of lower federal courts. See Richard D. Younger, *The People's Panel: The Grand Jury in the United States, 1634-1941*, at 44-45 (1963). However, at several of the state ratifying conventions, delegates debated the need for a specific grand jury guarantee, arguing that without it, the new federal government would be able to file informations and imprison "the most innocent person in the commonwealth" without indictment by a grand jury. 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787*, at 110 (Jonathan Elliott ed., Ayer Co. 1987) (1888) (statement of Holmes). Arguments that the new government would be one of integrity did not suffice to reassure delegates that prosecutors would not indiscriminately file informations against an individual and cause unjust "loss of his liberty, . . . loss of his time, great expenses, and perhaps cruel sufferings." *Id.* The Massachusetts convention recommended that the Constitution be amended to provide for indictment for capital offenses, and New York and New Hampshire followed suit. 1 *id.* at 323, 326, 328. At its first session, the new Congress proposed what is now the Fifth Amendment, and after ratification by the necessary number of states, it was adopted on December 15, 1791. Beale, *supra*, § 1:4, at 1-19.

The grand jury, with a pedigree older than that of many rights in the Constitution, thus occupies a central place in the American criminal justice system. The strength of the institution emerged in moments of upheaval and conflict with autocratic authority, and states demanded the grand jury in order to protect their citizens against the possible abuses of

the new federal power. For these reasons, the Fifth Amendment's guarantee of a grand jury in federal prosecutions is the cement which is integral to the foundation of the federal criminal justice system. The history and tradition of the grand jury demonstrate that it provided key support for this system, lending popular authority to the government's criminal proceedings and safeguarding the citizens against prosecutorial abuses. A violation of this grand jury right is properly deemed to constitute a "structural defect[] in the constitution of the trial mechanism." *Fulminante*, 499 U.S. at 309. To allow the errors in this case to go uncorrected would endanger an institution that has proven essential to the legitimacy of the criminal justice system.

Contrary to petitioner's arguments, the fact that the grand jury clause has not been incorporated into the Fourteenth Amendment does not diminish the effect of the error on the structure of a federal criminal proceeding. Simply because a state may not be required by the Constitution to use a grand jury does not mean that those sovereigns that do require a grand jury indictment are free to submit one crime to the grand jury and another to the petit jury, and then reserve for a sentencing judge the choice of the crime to use for sentencing. See *In re Winship*, 397 U.S. 358 (1970). State practice does not render the Fifth Amendment grand jury protections optional for federal trials. Cf. *Peters* v. *Kiff*, 407 U.S. 493, 501 (1972) (plurality) (holding that "if a State chooses, quite apart from constitutional compulsion, to use a grand or petit jury, due process imposes limitations on" the grand jury's composition). This Court has not hesitated to recognize that the grand jury system is "a central component of the criminal justice process" in reviewing a *state* court proceeding. *Campbell* v. *Louisiana*, 523 U.S. 392, 398 (1998). Petitioner does not explain why, if the grand jury process is "central" in a state court proceeding where it is not required by the Constitution, the value of the grand jury

process would diminish in a federal trial when the text of the Constitution commands the use of the grand jury.

Moreover, different jurisdictions may use different charging instruments, but regardless of their choice of instrument, a failure to initiate a criminal trial by charging the offense is a core defect that renders all subsequent proceedings void. Even in a state proceeding without a grand jury, the same illegal expansion of charges against a defendant violates due process and requires reversal. In *Cole* v. *Arkansas*, 333 U.S. 196 (1948), the state supreme court determined that defendants in a state court trial were charged in an information with violation of one subsection of an act (involving forcefully preventing workers from working during a labor dispute). *Id.* at 197-98. Since the jury was instructed on, and the evidence supported, a violation of a different section of the act (involving acting in concert to assemble near a labor dispute), this Court held that "[i]t is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." *Id.* at 201.[11] The decision not only protected defendants' rights at trial, but also constrained reviewing courts by holding that they could not affirm on the basis of an offense (even a section of the same act) that was not charged in an information. *Id.* at 202; see also *Dunn* v. *United States*, 442 U.S. 100, 106 (1979) ("To uphold a conviction on a

[11] *See also State* v. *Childs*, 724 N.E.2d 781, 786 (Ohio 2000) (affirming the reversal of a conviction, following a plea of no contest, on a conspiracy count, because "[t]he state's failure to allege a specific, substantial, overt act committed in furtherance of the conspiracy . . . render[ed] the indictment invalid"); *Jefferson* v. *State*, 556 So. 2d 1016, 1019 (Miss. 1989) (stating that "the failure of the indictment to charge . . . an essential element of a criminal offense, is not waived" by a guilty plea); *Cook* v. *State*, 902 S.W.2d 471, 480 (Tex. Crim. App. 1995) (holding a conviction void because the indictment failed to charge "a person," and thus "d[id] not vest the trial court with jurisdiction").

charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process.").

To avoid the conclusion that the error in this case was structural, petitioner relies on two inapposite case, *Neder* v. *United States*, 527 U.S. 1 (1999), and *Johnson* v. *United States*, 520 U.S. 461 (1997), to justify its proposed abandonment of this Court's precedent on the structural importance of an indictment by a grand jury. In *Neder* and *Johnson*, the Court considered errors in the presentation of the case to the petit jury and decided not to reverse because the evidence supported the juries' guilty verdicts. *Neder* applied harmless-error review, and *Johnson* applied plain-error review. Neither case had anything to do with deficiencies in an indictment; these were cases that dealt with omissions from jury instructions. The mistakes were "'simply . . . error[s] in the trial process itself.'" *Neder*, 527 U.S. at 8 (quoting *Fulminante*, 499 U.S. at 310). A mistake in the presentation of the case to the petit jury may logically be assessed in the context of the rest of the evidence presented to the jury. *Id.* at 18. A grand jury proceeding, on the other hand, "is not an adversary hearing in which the guilt or innocence of the accused is adjudicated." *Calandra*, 414 U.S. at 343. An error in a grand jury indictment allows only a "guess as to what was in the minds of the grand jury at the time they returned the indictment." *Russell*, 369 U.S. at 770.

Furthermore, the defendants in *Neder* and *Johnson* were tried "under the correct standard of proof," a fact the *Neder* Court noted as important in determining whether to notice the error. *Neder*, 527 U.S. at 9. Respondents in this case were sentenced for a crime based on an element found by a preponderance of the evidence, the wrong standard of proof. The *Neder* and *Johnson* cases also took into account pragmatic considerations that do not obtain here. The Court in those cases was concerned about reversing a conviction,

and it explained that "[r]eversal without any consideration of the effect of the error upon the verdict would send the case back for retrial—a retrial not focused at all on the issue of [the omitted element], but on contested issues on which the jury was properly instructed." *Neder*, 527 U.S. at 15; see also *Johnson*, 520 U.S. at 470. In the instant case, correcting the error would not mean reversing a conviction or granting a new trial. It would simply mean re-sentencing respondents for the crime that was presented to the grand and petit juries. *Neder* and *Johnson* are not only readily distinguishable but patently irrelevant to this case.

In the district court, petitioner failed to obtain from the grand jury an indictment that charged a § 841(b)(1)(A) offense, which, petitioner concedes, requires drug quantity to be included in the indictment. See *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000). The sentencing judge nevertheless found by a preponderance of the evidence that the quantity of drugs sufficed for a § 841(b)(1)(A) crime, and sentenced respondents for that crime. In short, there can be little doubt that sentencing a defendant for a crime not included in the grand jury's indictment on the basis of facts not found beyond a reasonable doubt by the petit jury constitutes a paradigm structural error. This type of error does more than "affect[] the framework within which the trial proceeds." *Fulminante*, 499 U.S. at 310. It deprives a defendant of "basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Rose*, 478 U.S. at 577-78 (citation omitted).

C. The Denial Of The Right To A Petit Jury Verdict Beyond A Reasonable Doubt On Each Element Of An Offense Is Structural Error Under *Sullivan* v. *Louisiana*.

In addition to the indictment error in this case, the error in having a sentencing judge rather than a petit jury decide an element of the offense under the preponderance of the evidence standard rather than the reasonable doubt standard constitutes the same type of error that the Court determined to be structural in *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993). In *Sullivan*, this Court considered a trial where a defendant was convicted under the wrong standard of proof: the judge gave the petit jury an erroneous reasonable doubt instruction. This error "unquestionably qualifie[d] as 'structural error,'" according to the Court. *Id.* at 282.

> Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly [a structural error], the jury guarantee being a "basic protection" whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function. The right to trial by jury reflects, we have said, "a profound judgment about the way in which law should be enforced and justice administered."

Id. at 281 (internal citation omitted).

Sullivan's error was the application of the wrong standard of proof, and it could not be remedied by allowing the reviewing court to weigh the evidence under the correct standard of proof, for this would deny the essential guarantees that guilt be found by a jury beyond a reasonable doubt. *Id.* at 281, 279. In the instant case, respondents suffered an equivalent error when an element of their sentenced offense was found, not under a faulty version of the beyond a reasonable doubt standard, but unambiguously under the wrong standard—by a mere preponderance of the evidence—and by the wrong fact-finder. This error alone qualifies as a

Sullivan structural error mandating reversal. There is an even more egregious injustice in this case than existed in *Sullivan*, however, since respondents suffered another error going to the very structure of the criminal justice process: the indictment did not charge the offense for which they were sentenced. If a flawed statement of the reasonable doubt standard was structural error, it defies reason to conclude that no structural error has occurred where there is blatant use of a lower standard by the wrong fact-finder and an indictment error this Court has already described as "far too serious" to shrug off as harmless error. *Stirone*, 361 U.S. at 217.

D. Structural Errors Warrant Correction Regardless of the Evidence.

According to this Court, when an indictment fails to allege an element of the crime, the fundamental nature of the error necessitates correction. See *Stirone*, 361 U.S. at 219 (reversing a conviction because of a "fatal error" in the indictment's failure to allege an element of the crime); *Bain*, 121 U.S. at 13; *Silber* v. *United States*, 370 U.S. 717 (1962) (per curiam). While minor defects in indictments may not require correction, "the substantial safeguards to those charged with serious crimes cannot be eradicated under the guise of technical departures from the rules." *Smith* v. *United States*, 360 U.S. 1, 9 (1959).

This Court has held that structural errors "require reversal *without regard to the evidence in the particular case*." *Rose*, 478 U.S. at 577 (citing *Chapman*, 386 U.S. at 23 n.8 (emphasis added)). They invalidate a conviction even though there may be no reasonable doubt that the defendant is guilty. See, *e.g.*, *Vazquez* v. *Hillery*, 474 U.S. 254 (1986) (reversing a conviction despite overwhelming evidence of the defendant's guilt because of an error in the grand jury composition). A structural error affects more than the accuracy of the result; by definition, it undermines the very process itself, and such an error cannot be plugged into an

evidence-quantifying formula. In *Tumey* v. *Ohio*, 273 U.S. 510 (1927), the Supreme Court reversed a conviction entered by a biased judge, even though "evidence show[ed] clearly that defendant was guilty," because "[n]o matter what the evidence was against him, [the defendant] had the right to have an impartial judge." *Id.* at 535. Similarly, a defendant has a right to indictment by a grand jury and conviction by a petit jury using the beyond a reasonable doubt standard no matter what the evidence is against him.

Recognizing these principles, this Court in *Sullivan* reversed a conviction when the petit jury guarantee was undermined by a faulty reasonable doubt instruction. The Court forbade a reviewing court to "engage in pure speculation—its view of what a reasonable jury would have done," when the result was that the "'wrong entity judge[s] the defendant guilty.'" *Sullivan*, 508 U.S. at 281 (alteration in *Sullivan*) (quoting *Rose*, 478 U.S. at 578). "[T]o hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee." *Id.* at 279. For the same reasons, a court is not permitted to speculate on a grand jury's possible decision on an element of an offense that was never charged. "To allow . . . the court . . . to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure." *Russell*, 369 U.S. at 770.

This Court has explained that structural errors are errors that "are so intrinsically harmful as to require automatic reversal (*i.e.*, affect 'substantial rights') without regard to their effect on the outcome." *Neder*, 527 U.S. at 7. Because such structural errors "deprive defendants of 'basic protections,'" *id.* at 8, they "will always invalidate the conviction." *Sullivan*, 508 U.S. at 279 (citing *Fulminante*,

499 U.S. at 309-10). Petitioner argues that in this case plain-error review applies and trumps the rule of reversal. See Pet. Br. at 43. However, respondents did not forfeit their claim of error, see *infra* III.A.3, and the rule of reversal compels correction of the structural errors in this case.

III. THE ERRORS IN THIS CASE WARRANT REVERSAL UNDER HARMLESS-ERROR OR PLAIN-ERROR REVIEW.

A. Reversal Is Warranted Under Harmless-Error Review.

1. Respondents' Right To Liberty And Their Right To A Grand Jury Were Violated By The Errors Here.

In all events, the errors in this case warrant reversal under harmless-error review. The error should be corrected unless the prosecution can show beyond a reasonable doubt that the error was harmless, *i.e.*, that it did not affect a defendant's "substantial rights." Fed. R. Crim. P. 52(a); see also *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986). Petitioner cannot meet its burden here because this Court already has determined that an indictment error like the one in this case can never be harmless error: "[d]eprivation of such a basic right [as the grand jury right] is far too serious to be treated as nothing more than a variance and then dismissed as harmless error." *Stirone* v. *United States*, 361 U.S. 212, 217 (1960).

In addition, an illegal increase in a sentence from a statutory maximum of 20 years to a term of life imprisonment, or from 20 years to 30 years, plainly affects a defendant's substantial rights. The offense whose elements were properly alleged in the indictment here carried a maximum statutory sentence of 20 years. However, five of the respondents were illegally sentenced to life in prison, and two others were illegally sentenced to 30 years in prison.

This error unlawfully deprived respondents of their right to liberty. This Court has already explained in *Apprendi* that if a defendant is sentenced based on a fact that was not proven to the jury, "it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened." *Apprendi* v. *New Jersey*, 530 U.S. 466, 484 (2000). "[I]t can hardly be said that the potential doubling of one's sentence—from 10 years to 20—has no more than a nominal effect. Both in terms of absolute years behind bars, and because of the more severe stigma attached, the differential here is unquestionably of constitutional significance," found the *Apprendi* Court. *Id.* at 495. The increases in the sentences in this case impose precisely the same grievous losses as those in *Apprendi*.

2. Respondents Did Not Receive The Constitutionally Required Notice Of The Crime For Which They Were Sentenced, But Even If They Had, Such Notice Could Not Cure The Defects In The Proceeding Here.

One of the purposes of the grand jury indictment is to provide notice to the accused of the charges against him. *Russell* v. *United States*, 369 U.S. 749, 763 (1962). The superseding indictment in this case did not include any allegations regarding the quantity of drugs, see *supra*, n.1, nor did the prosecution attempt to make up for this omission by later filing an information alleging the quantity, as it did in some cases. See, *e.g.*, *United States* v. *Promise*, 255 F.3d 150, 163 (4th Cir. 2001) (en banc), *petition for cert. filed*, No. 01-6398 (U.S. Sept. 20, 2001). Petitioner argues that this Court should ignore the errors in this case because respondents were not surprised by their sentences, based on the original indictment that had been superseded. Pet. Br. at 47. Petitioner fails to cite any case supporting the counter-intuitive proposition that a superseded indictment constitutes the "notice" due to an accused under the Constitution. See *id.* at 24. Compare *United States* v. *Olson*, 716 F.2d 850, 852-53

(11th Cir. 1983) (rejecting the district court's conclusion that defendant's lack of surprise rendered harmless the prosecution's failure to file a statutorily required information on a recidivism enhancement). To the contrary, the only inference to draw is that the offenses charged in the prior indictment have been abandoned in favor of the charges included in the superseding indictment. When the prosecution chose to drop the quantity allegation, the message it sent was that it had decided that it had insufficient evidence to prove this element beyond a reasonable doubt.

This Court has required an indictment to apprise the defendant of the accusation against him by including "such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged." *United States* v. *Hess*, 124 U.S. 483, 487 (1888). If an indictment fails to include the essential facts, it "enables [a defendant's] conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture." *Russell*, 369 U.S. at 766. That is precisely what happened here. Petitioner relies on evidence that may never have been shown to the grand jury (and, in any event, might have been ignored), and an accusation of drug quantity that was submitted to neither the grand jury nor the petit jury for a determination.

Even had the prosecution provided notice, this post-indictment notice would not suffice to remedy the errors here because the omission of an element from the indictment deprives an accused of more than notice. Beyond notice is the separate constitutional right, protected by Fifth Amendment, that a defendant be tried upon charges found by a grand jury. *Id.* at 770. Notice would not make up for the right that was violated—a determination by fellow citizens that there was probable cause supporting the precise charge. Thus, whatever notice was provided outside of the indictment,

a court "cannot know whether the grand jury would have included in its indictment a charge that" was never presented to it. *Stirone*, 361 U.S. at 219. Respondents' sentences cannot stand under harmless-error review because their substantial rights were undeniably affected.

3. Respondents Are Not Subject To Plain-Error Review Because They Objected At The Earliest Possible Moment In The Proceeding.

Plain-error review should not apply to this case because respondents objected at the earliest possible time during the proceeding. It was not until the prosecution first sought to establish the quantity element at sentencing that respondents could logically object to the quantity issue. See, *e.g.*, *United States* v. *Strayhorn*, 250 F.3d 462, 467 (6th Cir. 2001) (concluding that a defendant's objections to drug quantity on non-constitutional grounds at his pre-*Apprendi* guilty plea hearing and at sentencing sufficed to preserve an *Apprendi* claim for appeal). When the indictment charged an offense carrying a 20-year sentence, and the jury found facts supporting the same, respondents were not obligated to object to a failure to offer charges supporting a life-term sentence. Indeed, respondents could not object to the denial of their Fifth and Sixth Amendment rights until they appreciated that they were being sentenced for a crime for which they were never charged.

Plain-error review is designed to prevent "sandbagging" (where a defendant stays deliberately silent about an error at trial so that he may obtain a reversal on the basis of the error on appeal). See, *e.g.*, *Johnson* v. *United States*, 520 U.S. 461, 465-66 (1997) (noting that preventing sandbagging is important in determining whether to notice plain error). Respondents here could hardly be accused of "sandbagging" when *Apprendi*, upon which they rely, was not decided until after their trial. Respondents objected to the quantity of drugs at the earliest logical moment, at sentencing. Accordingly,

correcting the error in this case would not allow respondents to obtain "any strategic benefit from [their] failure to timely object to the error." *Promise*, 255 F.3d at 195 (Motz, J., dissenting).

The requirement that a defendant object exists so that the district court can correct the alleged error. See *United States* v. *Atkinson*, 297 U.S. 157, 159 (1936). In this case, however, the only error the district court could correct was the increase in sentence based on a finding of drug quantity. Respondents presented that objection in timely fashion. The district court could not have ruled that an *Apprendi*-type error had occurred, even had respondents raised a constitutional argument, because neither *Apprendi* nor *Jones* had been decided, and existing circuit precedent would have defeated the argument. See, *e.g.*, *United States* v. *Fletcher*, 74 F.3d 49, 53 (4th Cir. 1996). In fact, this Court has acknowledged the futility in requiring a defense attorney to "mak[e] a long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent." *Johnson*, 520 U.S. at 468. No purpose in promoting an orderly judicial process would be served by imposing the penalty of plain-error review in this case. See, *e.g.*, *United States* v. *Novey*, 922 F.2d 624, 629 (10th Cir. 1991) ("An exception to the rule precluding review exists where an intervening Supreme Court decision changes the law while an appeal is pending."); *United States* v. *Mulder*, 889 F.2d 239, 240 (9th Cir. 1989) (defendant's "claims are not waived because this failure [to raise the claims in the district court] was not due to any 'belated decision to change trial tactics,' but was caused by a recent Supreme Court case that directly affected his claim") (citation omitted). Plain-error review should not apply in this case.

B. Application of Plain-Error Review Warrants Affirmance of the Court of Appeals Decision.

1. Respondents' Substantial Right To Liberty Was Violated.

Under plain-error review, an error must affect a defendant's substantial rights. Fed. R. Crim. P. 52(b). In this case, when the sentencing court sentenced respondents for a crime with which they had not been charged, it deprived five respondents of their substantial liberty interest by increasing their incarceration from 20 years to life, and from 20 years to 30 years in the case of two respondents. See *supra*, III.A.1.

Petitioner tries to avoid this conclusion by speculating that had it charged respondents for the more serious offense, it would have obtained the same result. Pet. Br. at 48. This conjecture is irrelevant since the effect on respondents' rights is clear. See *Apprendi*, 530 U.S. at 484. Moreover, it ignores this Court's admonition to reviewing courts not to speculate on the result of grand jury proceedings: "neither this [Court] nor any other court can know that the grand jury would have been willing to charge" an offense other than the one included in the actual indictment. *Stirone*, 361 U.S. at 217.

In *Vasquez* v. *Hillery*, 474 U.S. 254 (1986), this Court forbade courts to conduct a review of the potential harm when the "structural integrity of the criminal tribunal itself" was "undermine[d]" because the effect of the error cannot be ascertained, and a court "cannot know" how the grand jury would have decided under alternative conditions. *Id.* at 263-64. Although *Hillery* was addressing grand jury discrimination, the principle that a court cannot speculate on a grand jury's decision applies equally to the error in this case. Indeed, *Hillery* explained that the grand jury "does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not," but also has the power to select "a greater offense or a lesser offense." *Id.* at 263.

Because the "'grand jury is not bound to indict in every case where a conviction can be obtained,'" *id.*, an evaluation of the evidence in hindsight cannot stand in for the grand jury's decision on whether to indict. Cf. *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993) (forbidding a reviewing court to "engage in pure speculation—its view of what a reasonable jury would have done," when the result was that the "'wrong entity judge[s] the defendant guilty'") (alteration in *Sullivan*) (quoting *Rose*, 478 U.S. at 578). Moreover, unlike a petit jury error, where the entire record is available to evaluate the input of a potential mistake, there is no record of grand jury proceedings that could serve as a benchmark for making a harmless-error assessment. A reviewing court therefore cannot substitute itself for the grand jury to determine the outcome of a grand jury proceeding on a charge that was not presented. For this reason, the failure to present a charge to the grand jury necessitates a presumption of prejudice. See *Stirone*, 361 U.S. at 217.

2. The Errors Undermined The Integrity, Public Reputation, And Fairness Of The Criminal Justice Proceeding.

The errors in this case merit reversal under plain-error review because they seriously affected the integrity, public reputation, and fairness of the judicial proceedings. See Fed. R. Crim. P. 52(b); *United States* v. *Olano*, 507 U.S. 735, 736 (1993). Respondents' sentences exceeded the statutory maximum for the indicted offense. The terms of their imprisonment were based on an element of an offense that was not charged in the grand jury indictment, and that was not found by the petit jury beyond a reasonable doubt. The errors deprived respondents of their Fifth and Sixth Amendment guarantees of an indictment by a grand jury and a petit jury verdict based upon the beyond a reasonable doubt standard of proof. This Court has exercised its own discretion under the plain-error standard to notice an error in an indictment that

had not been raised either before the court of appeals or this Court itself. *Silber*, 370 U.S. at 717. There was no error when the court of appeals did the same.

This Court has repeatedly affirmed that a violation of "such a basic right" as indictment by a grand jury can never be harmless error, *Stirone*, 361 U.S. at 217, that a defendant has a right not be sentenced or "convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him," *Russell*, 369 U.S. at 770; and that an "indictment found by a grand jury [is] indispensable to the power of the court to try the petitioner for the crime with which he was charged," *Ex parte Bain*, 121 U.S. 1, 12-13 (1887). Petitioner's position would require that these bedrock principles be rejected, thereby undermining the grand jury's role as a structural safeguard for the accused.

3. The Fourth Prong Of Plain-Error Review Calls For The Evaluation Of An Error's Effect Independent Of A Defendant's Innocence Or Guilt Where The Right Violated Protects Values Distinct From The Accuracy Function Of The Trial.

Petitioner claims that the errors in this case should not be corrected because there was evidence against respondents. Correcting plain error, however, does not depend on a defendant's innocence or guilt. Indeed, this Court has explained that an error can "seriously affect the fairness, integrity or public reputation of judicial proceedings *independent of the defendant's innocence*." *Olano*, 507 U.S. at 736-37 (internal quotation marks omitted) (emphasis added). Importantly, the *Olano* Court explained that a court "should" exercise its discretion to correct any plain error prejudicing a defendant's substantial rights which meets this fourth prong of the plain error test. *Id.* at 736.

Weighing evidence, which petitioner would have this Court do, is an analysis that applies to "the admission of . . . forms

of improperly admitted evidence." *Fulminante*, 499 U.S. at 310. It may be an appropriate exercise if the alleged error was minor or occurred during the presentation of the case to the petit jury. See *Neder* v. *United States*, 527 U.S. 1, 16-18 (1999); *Johnson*, 520 U.S. at 467. The error in this case, however, is not about accuracy but about the core structure of the criminal process. In dismissing an indictment because of a complete lapse in the grand jury process, this Court explained that "[t]he injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard* v. *United States*, 329 U.S. 187, 195 (1946) (grand jury discrimination). The Court has similarly protected other rights that serve functions unrelated to outcome accuracy. In *McKaskle* v. *Wiggins*, 465 U.S. 168 (1984), for instance, the Court addressed a defendant's right to represent himself at trial. The Court did not consider the evidence against the defendant (who was twice convicted by a jury, the first time on a defective indictment), because the right did not exist to promote the accuracy of the outcome but rather to protect dignitary values. See *id.* at 177 n.8, 182.

Evaluation of the evidence is similarly inapposite here, where the right to a grand jury protects values beyond the truth-seeking function of the trial. Like the right to self-representation, the right to a grand jury "is either respected or denied," *id.* at 177 n.8, and its denial is not amenable to an analysis of the error's effect on the outcome. Evidence-weighing is as useful in analyzing the harm of sentencing for an uncharged offense as a thermometer is in measuring the weight of a pile of bricks.

Contrary to petitioner's argument, *United States* v. *Mechanik*, 475 U.S. 66 (1986), does not suggest a different result. In *Mechanik*, a properly constituted grand jury returned a complete indictment against defendants. However,

the prosecutor had allowed two witnesses to be present at the same time before the grand jury. *Id.* at 67. This was arguably a violation of the terms of Federal Rule of Criminal Procedure 6(d), which refers in the singular to "the [grand jury] witness under examination." Without even deciding that the two-witness appearance breached the terms of Rule 6(d), the Court held that the costs of "reversal of a conviction" and retrial would outweigh the harm of such an error. *Mechanik*, 475 U.S. at 72. The *potential* technical error in *Mechanik* did not go to the core functions of the grand jury (indictment) and instead went only to the procedural mechanism of the grand jury's review of evidence and testimony. It stands in stark contrast to the fundamental and acknowledged errors in the instant case. In *Mechanik*, the mistake was, at most, a violation of a rule, whereas in the instant case, substantive, pervasive, and systemic errors violated the Fifth and Sixth Amendments and impaired the very core of the federal criminal justice system.

In this case, the multiple errors went not just to the question of accuracy—though certainly the wrong standard of proof employed by the wrong fact-finder has an impact on the accuracy of the trial result—but also to values reaching beyond the correctness of verdicts. By abandoning the requirement that a grand jury must return a indictment charging an offense before a federal court can sentence a defendant for that offense, the district court (albeit unwittingly) allowed the structural integrity of the proceeding to be irreparably compromised. Weighing the evidence cannot repair the harm to the judicial process.[12]

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[12] Petitioner's argument that there would be injustice if the more culpable defendants did not receive higher sentences, Pet. Br. at 49, cuts against petitioner. The fault for any such discrepancy lies with the prosecution for not formally charging the more serious offense against those who committed a more serious offense.

C. The Lower Court's Choice To Reverse In A Case Where Judicial Integrity Was Compromised Preserves The Discretionary Nature Of Plain-Error Review.

To sentence a defendant for an offense that was not charged in an indictment or found by a jury is an error that will always affect the fairness, integrity, and public reputation of the judicial process. However, the court of appeals did not, as petitioner suggests, institute a per se rule. Instead, the court chose to exercise its discretion:

> Because we believe that the "nature of the error" is "fundamental," that the "plain error was committed in a matter so absolutely vital to defendants," and, most importantly, that the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings," we "*feel ourselves at liberty* to correct it."

Pet. App. 12a (emphasis added) (internal citations omitted) (alteration in original). The decision of the court of appeals did not limit courts' discretion to notice or not notice errors, as the petitioner misstates the holding. See Pet. Br. at 12. Rather, the court elected to exercise its discretion because it found that the error injured the integrity of the proceedings. Rule 52(b) grants lower courts the discretion to correct such errors.

When the court of appeals enjoys "discretion" to make a determination, this Court should not reverse that determination absent an abuse of that discretion. See, *e.g.*, *United States Nat'l Bank of Oregon* v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 447-48 (1993) (holding that the court of appeals "had discretion to consider" an issue not raised by either party, and its decision to consider the issue "was certainly no abuse of its discretion"); *Weisgram* v. *Marley Co.*, 528 U.S. 440, 454, 456 (2000) (affirming the circuit court in its "exercise of 'informed discretion'" because it "did not abuse its discretion"). It is entirely conceivable that a

court might decline to exercise its discretion to notice an error in a closer case where a genuine issue arose as to whether the indictment was indeed fatally defective. But it is inconceivable that a court's choice to notice the Fifth and Sixth Amendment errors in this case constitutes an improper exercise of its statutory discretion.

In fact, petitioner's argument, if accepted, would do just what it accuses the court of appeals of doing: it would eliminate a court's discretion under plain-error review. If petitioner is successful in promoting its newly fashioned rule, then a court will be unconditionally barred from correcting an error—no matter how seriously the error affected the integrity, fairness, or reputation of the proceeding—if there is a certain quantity of evidence against the defendant. The per se approach advanced by petitioner is inconsistent with the discretionary nature of plain-error review.

* * * *

This Court has already explained the consequences of allowing a trial court to convict or sentence a defendant for an offense that was not in an indictment:

> If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says "no person shall be held to answer," may be frittered away until its value is almost destroyed.

Bain, 121 U.S. at 10. The historic place of the grand jury in protecting the accused from the government underscores the centrality of the indictment process in a criminal proceeding. Similarly, when the prosecution withholds an element from

the grand jury and the court removes an element from the petit jury, to instead sentence the defendant for a different offense under the wrong standard of proof, the criminal justice system has been dealt a severe, if not fatal, blow. To ignore such errors would require this Court to discard centuries of precedent protecting the rights of defendants and the integrity of the process itself in favor of a system that seeks conviction at all costs. The Framers of the Constitution rejected that system more than 200 years ago. This Court should implement the Framers' intent.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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